

ARTICLE

Invalidating Civil Juristic Acts: Public Order and Good Morals in the Chinese Civil Code

Kwan Yiu Cheng

University College London, UK

Email: kwan.cheng@ucl.ac.uk

(Received 12 November 2023; revised 18 March 2024; accepted 24 April 2024)

Abstract

This article discusses the concepts of public order and good morals in the Chinese Civil Code. Under Article 153 of the Civil Code, a civil juristic act is rendered void if it violates these concepts. This article examines their substance, functions, and practical significance in determining the invalidity of civil juristic acts in Chinese civil law. *Public order* refers to interests relating to national security and matters fundamental to the social public order, and *good morals* refers to virtuous customs representing social morality, family ethics, and personal dignity. It is argued that the nuances of the concepts are purposeful, but they must be wielded by the judiciary with objectivity and precision. It shows, comparatively, that in Chinese jurisprudence, the concepts of public order and good morals are intended to be applied flexibly and are widely accepted as capable of addressing areas where the law remains underdeveloped. Chinese courts are therefore tasked with achieving justice for litigants in each case and social justice at the same time without compromising private autonomy. In the final analysis, these concepts can be viewed as part of a broader commitment to ensuring the law operates in line with social changes and continues to garner public support for the judicial system.

Introduction

Civil legal relationships may at times be influenced by notions of public order and morality. This article analyses this paramount aspect of civil law in China. China's Civil Code came into force on 1 January 2021. As the overarching law which provides for the fundamental principles regarding civil acts and relationships that lawyers and judges refer to when considering and resolving civil disputes, it authoritatively lays down the general rule that no civil juristic act in the jurisdiction shall be in violation of public order (*gongxu*) and good morals (*liangsu*). This is known as the invalidation of civil juristic acts offending *gongxuliangsu*. In the Civil Code, the concepts of public order and good morals feature prominently for no fewer than eight times on matters including determining the validity of civil acts. Given its scope, it is crucial to understand the relevance of the two concepts both in context and in practice. With reference to the latest judicial interpretation promulgated in December 2023 and other typical cases, this article provides a much-needed in-depth understanding of the concepts in Chinese law and of how they reflect the general civil law landscape in China. Its purpose is to illustrate the relevant legal principles on public order and good morals in Chinese law and discuss comparatively how these are applicable to a wide range of situations whilst ensuring a careful balance that demarcates the boundaries of judicial discretion.

This article begins with a brief outline of the relevant articles in the Civil Code, along with their legislative history. It first introduces the core provision, Article 153 of the Civil Code. It then discusses the contents of the concepts of public order and good morals from conceptual and practical perspectives, illustrated with typical examples, their reach and underlying values as well as the modern-day judicial applicability of these values. The next section discusses the normative ambit for public order and good morals. To categorise a transaction as offensive to public order and good morals requires, at the same time, taking into account the fact that parties involved in civil legal relationships often hold a legitimate expectation that their transactions will be recognised in law. It is suggested that the concepts serve to discourage intolerable instances of breaches premised on an objective judicial assessment. At the same time, in Chinese civil law, the legal principle of *gongxuliangsu* is intended and widely accepted to be flexible. This article reflects on its functional fluidity in Chinese jurisprudence. The concepts of public order and good morals with Chinese characteristics serve a nuanced purpose by providing judges with the flexibility to render decisions not only to dispense justice between the immediate litigants but also to make justice tangible. The principle of *gongxuliangsu*, together with President Xi Jinping's ideology of the rule of law, especially given its public dimension intertwined with matters of public order and good morals, manifests a commitment to social justice as a whole. This article contributes to offering a firmer understanding of the dimensions of public order and good morals in the Chinese national judicial and cultural context.

Legal Provisions in the Civil Code

Before the Civil Code came into force in 2021, civil legal relationships were regulated under different pieces of national legislation. In the context of contractual relationships, the Contract Law 1999 was the uniform law on contracts in which Articles 52(4) and (5) stipulated that a contract is invalid where 'harm is done to social and public interests' or 'mandatory provisions of laws and administrative regulations are violated'.¹ Similarly, where the relationship pertains to property, Article 7 of the Property Law 2007 provided that '[t]he attainment and exercise of property rights shall comply with laws, social morality and shall not do harm to the public interests and the legitimate rights and interests of others.' As to the previous general laws on civil matters, the General Principles of the Civil Law 1986 likewise prescribed that 'Civil activities shall have respect for social ethics and shall not harm the public interest, undermine State economic plans or disrupt social economic order' in Article 7. In the General Provisions of Civil Law 2017, which are perceived as having laid down the foundation for the General Provisions in the Civil Code, the term *gongxuliangsu* was first featured. Article 8 of the Civil Code provides that '[t]he parties to civil legal relations shall not conduct civil activities in violation of the law, nor contrary to public order and good morals.' The term *gongxuliangsu* was used in the 2017 Law for the first time in national legislation to replace the expressions of social and public interests and social morals.

In the Civil Code, the phrase *gongxuliangsu* retains its prominence in affecting civil legal relationships. It appears in Articles 8, 10, 143, 153, 979, 1012, 1015, and 1026. Article 8 provides that '[w]hen conducting a civil activity, no person of the civil law shall violate the law, or offend public order or good morals'. Article 10 provides that '[c]ivil disputes shall be resolved in accordance with the law. Where the law does not specify, custom may be applied, provided that public order and good morals may not be offended.' Both are general principles contained in the General Provisions of the Civil Code. More relevant in practice are Articles 143 and 153 of the Civil Code.

Article 143 states that '[a] civil juristic act is valid if the following conditions are satisfied: (1) the person performing the act has the required capacity for performing civil juristic acts; (2) the intent expressed by the person is true; and (3) the act does not violate any mandatory provisions of laws or administrative regulations, nor offend public order or good morals.' A reading of Article

¹ See Chao Xi, 'Contract Law and Financial Regulation in China: An Illegality Perspective' (2022) 38(1) Journal of Contract Law 79.

143 suggests that a civil juristic act (defined in Article 133) is not valid if it violates any mandatory provisions of laws or administrative regulations or offends public order or good morals. Article 153 further specifies that the effect is that the civil juristic act concerned will be void: '(1) A civil juristic act in violation of the mandatory provisions of laws or administrative regulations is void, unless such mandatory provisions do not lead to invalidity of such a civil juristic act. (2) A civil juristic act that offends the public order or good morals is void.' The remaining Articles are scattered. Article 979(2) relates to an exception of *negotiorum gestio*; Articles 1012 and 1015 relate to the right to name; and Article 1026 relates to the obligation to supervise when reporting news. Article 153 of the Civil Code now has to be considered alongside the recent Interpretation by the Supreme People's Court of Several Issues Concerning the Application of General Provisions of Contract Law of the Civil Code (the 'Interpretation').²

An Overview of Article 153

This article focuses on Article 153 of the Civil Code as it is the substantive legal provision that covers most civil juristic acts such as the creation of contracts, debts, wills, and property rights, whereas the other provisions in the Civil Code are specific to certain areas of law. A civil juristic act is 'an act through which a person of the civil law, by expression of intent, creates, alters, or terminates a civil juristic relationship'.³ Such acts are central to the private law system, as essentially, they are acts conducted by persons under civil law which give rise to rights and obligations among them.

Before examining in depth the concepts of public order and good morals, it is necessary to appreciate the effect of Article 153. As a general rule, a civil juristic act that violates mandatory provisions of law or administrative regulations (Article 153(1)) and public order and good morals (Article 153(2)) is void. The act does not create any rights or obligations and has no legal effect at any time. A party does not have to take any action to render the act void, although in a legal dispute, a court may declare that the civil juristic act is void.

The most straightforward application of Article 153 is where an act violates mandatory provisions of law such as criminal law or administrative regulations – this leads to invalidity of the act.⁴ But where the act violates a source of law which is of lower hierarchy such as local regulations, administrative rules, or normative documents, there is no immediate application of Article 153(1) in rendering the act void. Instead, the applicable provision is Article 153(2). The courts would have to consider whether the act violates public order and good morals similar to other actions not prescribed by any formal legal sources. It is helpful to consider the latter more complex scenario before moving to discuss the concepts in depth to illustrate the general structure and coherence of Article 153.

Violation of laws or regulations of lower hierarchy

If the act violates provisions in a source of law of lower hierarchy, the courts may still consider that the violation of a provision contained in an administrative rule or normative documents involves an affront to public order or good morals. While administrative rules are sources of law, they are of lower hierarchy than the law and administrative regulations stated in Article 153(1).⁵ Normative documents are not formal sources of law in the Chinese system but are non-legislative documents with binding force on private parties in a specific field.⁶ Guiding Case No. 170 aptly illustrates this.⁷

²Fa Shi [2023] No 13.

³Chinese Civil Code, art 133. See also C Sumner Lobingier, 'Juristic Acts in the Civil Law' (1949) 24 Tulane Law Review 178.

⁴Unless they fall under the exceptions contained in Article 16 of the Interpretation (see n 2).

⁵See Legislation Law of the People's Republic of China.

⁶Kwan Yiu Cheng, 'China's Crackdown on Crypto Mining from a Climate Perspective: Unified Efforts from Administrative Authorities and the Judiciary' (2024) 1 International Journal of Digital Law and Governance 91.

⁷Supreme People's Court Guiding Case No 170: *Raoguoli Yu Jiangxisheng Jianyuguanliju Wuzigongyizhandeng Fangwuzudai Hetongjiufenan* (2019) Zuigaofaminzai No. 97. Guiding cases are published by the Supreme People's Court.

In the case, the plaintiff was the proprietor of a hotel. After winning the bid to lease a business building owned by the defendant, the plaintiff entered into a lease with the defendant. Clause 5 of the lease stipulated that, since the leased property had been identified by relevant authorities as a ‘dangerous building’, it would need to be reinforced structurally before use. The plaintiff was aware of the issues and defects related to the leased property. The plaintiff attempted to fulfil its contractual obligation under Clause 5 by reinforcing the property to make sure it met the standards for commercial real estate use. However, during the reinforcement construction process, a significant portion of the building collapsed.

Meanwhile, a ‘Housing Safety Appraisal Opinion’ issued by the Jiangxi Provincial Construction Safety Production Supervision and Management Station stated that the main structure of the property leased, including its design and construction of load-bearing components, did not meet the requirements of the current national design and construction standards and posed significant structural risks. Further, according to the Standards for Appraisal of Dangerous Housing, the building was classified as a ‘Class D dangerous structure’ and was to be completely demolished as soon as possible. Furthermore, Article 6 of the Administrative Measures for Leasing of Commercial Housing (Administrative Measures), a ministerial rule issued by the Ministry of Housing and Urban-Rural Development, stipulates that buildings which do not comply with mandatory standards for safety, disaster prevention, and other engineering construction shall not be leased.

The plaintiff filed a lawsuit in court, claiming the termination of the lease, the return of a security deposit of RMB 2.2 million, and compensation for various economic losses totalling RMB 2.81 million. The defendant counterclaimed, requesting the plaintiff be held liable for infringement and be ordered to pay RMB 24.635 million in compensation. The Supreme People’s Court, in its final ruling following two lower court judgments, determined that the lease was invalid. The Court ordered the defendant to return the security deposit of RMB 2.2 million to the plaintiff and rejected all other claims from both parties.

The Supreme People’s Court held that the contract concluded was in contravention of Article 6 of the Administrative Measures. While the Administrative Measures are a ministerial rule in terms of legal hierarchy, Article 6 reflects the protection of public safety and the maintenance of public order. In circumstances such as in the case at stake, where the property in question had been found to pose serious structural risks and was required to be demolished as soon as possible, the parties entering into a lease to operate a hotel on such premises endangered the safety of the general public. Such behaviour constitutes conduct contrary to public order. From the perspective of safeguarding public safety and establishing correct social values, the court added that it shall not lend support to or encourage behaviours which neglect public safety for the pursuit of economic interests.

A careful analysis of the regulatory objective in documents of lower hierarchy than law and administrative regulations is necessary. For example, nominee shareholder agreements of financial leasing companies, prohibited in rules promulgated by the Banking and Insurance Regulatory Commission,⁸ are invalid to the extent that holding shares of financial leasing companies as a nominee shareholder for natural persons violates *gongxuliangsu*. This is because the specific qualification for shareholders of financial leasing companies to consist only of legal persons is intended to strengthen the supervision and management of financial institutions, prevent and mitigate financial risks, promote the healthy development of financial institutions, and safeguard social and economic order as well as

They have a generally strong persuasive effect on lower courts and lower courts should refer to the guiding cases when deciding similar cases. See Deng Jinting, ‘The Guiding Case System in Mainland China’ (2015) 10(3) *Frontiers of Law in China* 449.

⁸See Measures for the Administration of Financial Leasing Companies (2014) and Implementation Measures of the China Banking and Insurance Regulatory Commission for the Administrative Licensing Items concerning Non-Banking Financial Institutions (2020). The Banking and Insurance and Regulatory Commission is now defunct. See ‘China to set up new financial regulator in sweeping reform’ (Reuters, 7 March 2023).

public interests.⁹ In a similar vein, nominee shareholder agreements of listed companies are likely to be invalid because they obscure regulatory measures on disclosure and connected transactions and undermine the public interest in the stability of financial markets.¹⁰ However, nominee shareholder agreements of private limited companies are generally valid.¹¹

The need to closely analyse the underlying objectives of the provisions contained in departmental and ministerial rules is emphasised in the Notice by the Supreme People's Court on Issuing the Minutes of the National Court Work Conference for Civil and Commercial Trials 2019, which is intended as guidance to all national courts. Paragraph 31 of the Notice states that:

The violation of departmental or ministerial rule in usual circumstances does not affect the validity of a contract. However, when the content of such rule pertains to financial security, market order, national macro-policies, or other matters concerning public order and good customs, the contract should be deemed invalid. When determining whether regulations touch upon public order and good morals, the People's Court should carefully consider the regulatory object while taking into account factors such as the intensity of regulation, protection of transaction security, and social impact. The considerations should be thoroughly expounded upon in the judicial decisions.

This paragraph summarises the current approach taken by Chinese courts when confronted with allegations that a departmental or ministerial rule has been violated. Where the rule contravened is of lower hierarchy in the sources of law than law and administrative regulations, the civil juristic act is considered under *gongxuliangsu* with reference to the rule's regulatory objective in determining how public order or good morals are affected by the act in question. At the same time, not all provisions contained in sources of law, regardless of hierarchy, relate to *gongxuliangsu*.

The Concept of *Gongxuliangsu*

This article focuses on the concepts of *gongxu* (public order) and *liangsu* (good morals) in Article 153(2) rather than the less abstract rule in Article 153(1) where the civil juristic act is in violation of mandatory provisions of law or administrative regulations. As can be seen from Guiding Case No. 170, the national courts are constrained in determining the severity of issues that require moral intuition or involve matters the legislature has deemed not offensive enough to be stigmatised and punished by criminal courts. Insofar as the law is considered a manifestation of public order and good morals, *gongxuliangsu* is applicable only where some aspects of it have yet to be incorporated into the law or administrative regulations. The question sought to be answered in this section is what *gongxuliangsu* conveys as a concept in Chinese civil law. This section explores its meaning from both conceptual and practical perspectives.

The Concept of *Gongxu* – Public Order

Conceptually, the general judicial perspective is that:

public order (*gongxu*) refers to the fundamental order and underlying principles in various public domains such as politics, economics, and culture. It encompasses fundamental principles, values, and order that are related to the overall interests of the State and society.¹²

⁹Shanghai Guozheng Touzi Guanli Youxian Gongsi Yu Chen Suowen Deng Qita Hetong Jiufen Shangsu An (2021) Hu 02 Min Zhong No. 2446.

¹⁰Yang Mouguo Su Lin Moukun, Changzhou Yamadon Gufen Youxiangongsi Guquan Zhuanyi Jiufen Zai Shen An (2017) Zuigao Fa Min Shen No. 2454.

¹¹Provisions of the Supreme People's Court on Several Issues concerning the Application of the Company Law of the People's Republic of China (III) Fa Shi [2020] No. 18, art 24.

¹²See for example, Changxiuqin, Wangrandeng Laodongzhengyi Minshi Ershen Minshipanjueshu (2023) Liao 09 Minzhong No 726.

Examples of contracts that offend public order include those facilitating tax evasion and unfair competition.¹³ The interpretation of this concept in the Civil Code corresponds to Articles 52(1), 52(2), and 52(4) of the now repealed Contract Law. They provide that a contract is invalid if ‘one party induced conclusion of the contract through fraud or duress and impairs the State’s interests’, ‘the parties colluded in bad faith, thereby harming the interests of the State, the collective or any third party’, and ‘the contract harms social and public interests’. While public order is a general phrase, it is generally agreed that there is a typology of situations in which this concept may operate. They include contracts which (1) harm national political, economic, financial, taxation or security order; (2) restrict economic freedom; (3) violate fair competition; (4) violate consumer protection; and (5) violate labour protection.¹⁴

In the recent Interpretation, the Supreme People’s Court has further clarified what constitutes violations of *gongxu*. Article 17 provides that (1) contracts which ‘affect the nation’s political security, economic security, military security, or otherwise the national security’, and (2) contracts which ‘affect social stability or fair competition, harm the public interest, or otherwise disrupt the public order’, are civil juristic acts to be held invalid in accordance with Article 153(2). The idea is that *gongxu* can be divided into, broadly, national security and social public order. Contracts which affect political, economic, military, or national security are in the subset of national security, whilst contracts that affect the fundamental public order of society fall under the subset of social public order. The latter subset, social public order, refers to the general order necessary for the existence and development of a modern civilised society such as health and safety, economic order, and order in public places. Since many civil juristic acts may affect social public order in everyday life, an act is only to be invalidated when it has a significant impact on the maintenance of the order concerned to the extent that it affects the fundamental order in society.

Gongxu in Judicial Practice

In practice, however, an express reference to the concept of public order is more limited in resolving civil disputes compared with the courts’ repeated emphasis on *liangsu*, as will be discussed later. This is because most civil juristic acts which may appear to fall within the categories identified above are likely to have already been prohibited by laws or administrative regulations.¹⁵ For instance, the Chinese Criminal Law is neatly divided into sections which resemble the overall concept of public order: crimes endangering national security (Chapter 1 of Part 2), crimes endangering public security (Chapter 2 of Part 2), crimes destroying the order of socialist market economy (Chapter 3 of Part 2) including provisions on financial fraud, and crimes obstructing the administration of social order (Chapter 6 of Part 2) including provisions on obstruction of justice and endangerment of public health and natural resources. In relation to acts hindering fair competition, they are regulated by the Anti-Unfair Competition Law and the Anti-Monopoly Law. It follows that it is only where there is a borderline factual circumstance which may seem to fall outside the ambit of the Criminal Law, and other laws and administrative regulations that it will be necessary for the courts to rely explicitly on the notion of public order. Civil juristic acts involving criminal offences, such as contracts involving concealment of an offence, are, for example, invalid by a straightforward application of Article 153(1) unless the exception contained in the proviso applies.

As explained, public order entails a wide range of public interests, but it is applicable only as a legal concept to invalidate civil juristic acts when these interests have not yet been included in laws

¹³See Jun Zhao, ‘The Puzzle of “Freedom of Contract” in China’s Contract Law’ (2010) 17(1) ILSA Journal of International & Comparative Law 105.

¹⁴See Dequan Liu and Honglei Yu, *The Collection of the Supreme People’s Court’s Judicial Rules: Civil Disputes* (最高人民法院司法观点集成:民事讼卷) (People’s Court Publishing 2014) 83–84 (in Chinese).

¹⁵See Bing Ling, *Contract Law in China* (Sweet & Maxwell Asia 2002) 171.

or administrative regulations as statutory safeguards. This is particularly relevant to emerging phenomena such as unprecedented societal conditions and evolving technologies where the concept of public order can play a pivotal role. An illustrative example is the nascent area of mining and trading of ‘virtual currencies’, i.e. Bitcoin and its equivalents. It is the State’s view that it is essential to resolutely clamp down on speculation of ‘virtual currencies’ to safeguard people’s property and maintain economic, financial, and social order.¹⁶ The latest policy position is contained in the Notice on Further Preventing and Resolving the Risks of Virtual Currency Trading and Speculation jointly issued by the People’s Bank of China, Supreme People’s Court, and nine other ministries in 2021. It is made clear that crypto-related business activities within China may constitute crimes. If a crypto-related activity satisfies the requirements of specific offences in the Criminal Law, criminal responsibility shall be pursued in accordance with the law. Paragraph 4 of the Notice stipulates that:

participation in virtual currency investment and trading activities carries legal risks. Any legal entities, non-legal entities, and individuals investing in virtual currencies and related derivatives, in violation of public order and good customs, shall have their related civil legal actions declared invalid, and any resulting losses shall be borne by them.

Since such policy has not yet culminated in national legislation or administrative regulations, the mechanism for declaring a relevant civil juristic act invalid will be on the basis that it violates public order and good morals instead of plain vanilla illegality. The courts have suggested that crypto-mining activities violate public order as they adversely impact the nation’s effort to optimise its industrial structure, impede energy conservation and the attainment of carbon neutrality aims, in addition to disrupting financial order and fostering illegal activities.¹⁷ Whether there is a violation of public order is therefore a matter of degree, which has to be countenanced with an objective assessment of the extent of its intrusion into an array of interests protected under the umbrella.

The Concept of Liangsu – Good Morals

For *liangsu*, the prevailing judicial view is that it refers to ‘customs based on prevailing social moral values, also known as public morality, which are ethical norms widely recognised and adhered to by all members of society.’¹⁸ In judicial practice, the types of situations commonly found to fall within this concept are (1) disruption of family relationships; (2) violation of sexual morals; (3) infringement of human rights and personal dignity; (4) aleatory (gambling) contracts; and (5) profiteering activities.¹⁹ In a similar vein, the latest Interpretation specifies that contracts which ‘deviate from social morality or family ethics, destroy personal dignity, or otherwise violate customs’ are to be held invalid.²⁰ The phrase ‘customs’ in this concept implies that the relevant norms are identified through long-standing practices or traditions while ‘good morals’ represents the positive and virtuous social norms selected from these norms. It follows that the courts are required to analyse whether the social norms are well-established and whether they are virtuous. The concept represents the good values emerging from moral knowledge and consciousness which are common and widely accepted by the public.

The significance of the concept of *liangsu* in invalidating civil juristic acts is that the standard of good morals becomes essentially a standard of law which mandates people to refrain from violating not only blackletter law, but also common ethical standards as they conduct their civil relationships. While in common law jurisdictions, illegality and public policy, to the extent that they affect contracts

¹⁶ Alun John, Samuel Shen, and Tom Wilson, ‘China’s top regulators ban crypto trading and mining, sending bitcoin tumbling’ (Reuters, 24 Sep 2021).

¹⁷ See Cheng (n 6).

¹⁸ See *Changxiuqin* (n 12).

¹⁹ See Liu and Yu (n 14).

²⁰ Civil Code, art 17(3).

and other civil relationships, have moved to focus primarily on statutes rather than immorality, public morality still plays a prominent role in civilian thinking.²¹ Given the Chinese legal system's civil law framework and its *sui generis* character, the distinctive concept of 'good morals' with Chinese characteristics warrants closer examination with reference to some illustrative examples below.

Violation of Good Morals – Typical Situations

The most prevalent situation in which a civil juristic act may be found immoral is when it disrupts family relationships. This is an instance of deviating from family ethics. A common example is a civil act premised on the basis of cohabitation with someone outside marriage. Under the Civil Code, extramarital cohabitation is defined as the situation where a married individual and a person of the opposite sex, not in the capacity of spouses, continuously and stably live together.²² It is trite in Chinese law that where a spouse disposes of assets jointly owned by the married couple in favour of a person with whom the spouse is in extramarital cohabitation, the disposition or gift is invalid because it violates good morals. The concept of community property, which is jointly owned by the spouses, is defined under Article 1062 of the Civil Code, which covers income acquired by either spouse during the marriage, such as salaries, investment profits, and other types of income generated from property jointly owned by the spouses. As such, where there is a transaction which cannot be explained by other reasons except that there is an extramarital affair, such as a business relationship, the courts can readily interfere to find that any disposition is invalid if the other spouse raises the matter judicially. This is commonly known as an invalidation of a gift contract for violation of good morals in Chinese law. The default position is that the community property is considered an indivisible whole.²³ The husband and wife have equal rights when it comes to the disposition of the community property except for daily necessities.²⁴ It does not matter whether the property disposed of is of personal or real nature, nor does the amount matter. Multiple instances of bank transfers will be sufficient for, typically, the wife to challenge such transactions before the courts by suing the mistress.²⁵ Such transactions are considered immoral because they undermine the integrity of the marriage institution and any benefit arising out of the illegitimate extramarital relationship shall not be protected or recognised by the judiciary.

This principle applies not only to *inter vivos* dispositions but also to testamentary dispositions. A textbook example is the *Luzhou Yizeng An*, which concerns a will made by a man in which he decided to bequeath his property to his mistress rather than his wife or immediate family members.²⁶ The man was married to the defendant for some 30 years with an adopted son. Since 1994, the man was in a relationship with the claimant, and in 1996 they began cohabiting and jointly operated a business. At no time did the man seek to divorce the defendant. In February 2001, the man was seriously ill and hospitalised, during which time, the defendant continuously cared for him as the court acknowledged. Yet, in the will made on 18 April 2001, the man decided to bequeath essentially all of

²¹Birke Hacker, 'The Impact of Illegality and Immorality on Contract and Restitution from a Civilian Angle' in Green Sarah and Alan Bogg (eds), *Illegality after Patel v Mirza* (Hart Publishing 2018).

²²Interpretation (I) of the Supreme People's Court on the Application of the 'Marriage and Family' Book of the Civil Code of the People's Republic of China Fa Shi [2020] No. 22, art 2.

²³*ibid.*

²⁴See Civil Code, art 1062: 'The following property acquired by the spouses during their marriage constitutes community property and are jointly owned by the spouses: (1) salaries and wages as well as bonuses and other remuneration received from services rendered; (2) proceeds obtained from production, business operation, and investment; (3) proceeds arising from intellectual property rights; (4) except as otherwise provided in Subparagraph (3) of Article 1063 of this Code, property acquired from inheritance or given as a gift; and (5) other property that shall be jointly owned by the spouses. Husband and wife have equal rights when disposing of the community property.'

²⁵See for example, *Baiyunyun, Maotingting Zengyuhetong Jiufenminshi Ershen Minshipanjueshu* (2022) Gan 10 Minzhong No. 1808.

²⁶*Zhangxueying Su Jianglunfang* (2001) Naxi Minchizi No 561, (2001) Lumin Yizhongzi No. 621.

his personal property to the mistress. The mistress sought to execute the will, asking the defendant to transfer the property to her. The court refused to execute the will and ruled that the substance of the will violates the fundamental principle of good morals, rendering it invalid despite satisfying the formalities.

This judgment contains strong moral implications with an apparent conflict between testamentary freedom and the courts' oversight of good morals. The same reasoning has continued to be applied by the courts throughout the past twenty years or so. In a recent high-profile case, a man made a will bequeathing all three properties acquired during marriage to an extramarital cohabitee who acted as a carer in his twilight years for over a decade.²⁷ The bequest was contested by the testator's estranged spouse, with whom he had been separated for many years, despite the fact that the testator had initiated divorce proceedings against her on two occasions where the court refused the petition. The court on appeal ruled that the property belonged to the community property jointly owned by the husband and wife before death. The unilateral expression of the intention to dispose of the property to someone outside the marriage is not to be given effect because the extramarital relationship is immoral and shall not be acknowledged by the courts. As such, the will is invalid and not to be enforced.

Concerning social morality and human dignity, typical examples of offending sexual morality include aiding prostitution, contracts of prostitution, and contracts involving the transfer or establishment of brothels.²⁸ Whether a surrogacy contract involves a breach of social morality is subject to much interpretation with varied approaches in the courts.²⁹ A debt premised on explicit photos of the debtor as collateral or guarantee is invalid because it affronts social morality and violates the fundamental principles of public decency.³⁰ The explicit materials are not considered property but are inherently linked to personal rights and bodily integrity. They are classified as obscene materials which are prohibited from circulation by the State, rendering them unacceptable as collateral.³¹ Such loan arrangements may also be regarded as an infringement of personal dignity. Where one uses their family members' personal freedom as collateral for a loan or transacts the family members' labour without consent and where excessive restrictions on personal liberty are imposed in a contract, they are instances of a breach of good morals for the invasion of human rights and personal dignity.³² Another example of violating human dignity is employment contracts that exclude the employer's responsibility for any workplace injuries. Restraint of trade clauses may fall under this category insofar as they unduly restrict an employee's activities.

Aleatory contracts, such as gambling contracts, unless officially licensed and profiteering activities are also considered acts that violate social morality. One of the more relevant examples in the commercial context is the validity of a valuation-adjustment mechanism (VAM) agreement, also known as a bet-on agreement, which is present in some Chinese private equity merger and acquisition deals.³³ Since 2019, the general approach has been that in the absence of other vitiating factors, a VAM agreement between an investor and a target company's shareholders or actual controllers is

²⁷ *Yangmou Yu Chenmou1deng Yizengjiufen An* (2018) Yue 0305 Minchu No. 2160, (2019) Yue 03 Minzhong No. 21725.

²⁸ First Civil Division of the Supreme People's Court, *Zuigao renmin fayuan minfadian hunyin jiating bian sifa jieshi yi lijie yu shiyong* (最高人民法院民法典婚姻家庭编司法解释(一) 理解与适用) [*Understanding and Application of the Supreme People's Court's new Judicial Interpretation on Private Lending*] (People's Court Publishing 2021) 236-238.

²⁹ Chunyan Ding, 'Surrogacy litigation in China and beyond' (2015) 36 *Journal of Law and the Biosciences* 33.

³⁰ Ye Jia, "'Nude-for-cash' loans running rampant, tarnishing the rule of law' ('裸贷'肆虐, 让法治蒙羞) *Procuratorate Daily* (14 December 2016, Beijing) (in Chinese).

³¹ *ibid.*

³² See First Civil Division of the Supreme People's Court (n 29).

³³ See Xiaogang Bi, 'Make a promise: the valuation adjustment mechanism in Chinese private target acquisitions' (2021) 16 *The European Journal of Finance* 1645.

valid and enforceable.³⁴ Profiteering refers to activities that pursue excessive profits through unethical, unfair, or exploitative practices which harm the interests of more vulnerable groups such as workers or customers. So far, Chinese courts are flexible in the application of *liangsu*. There is no definitive categorisation of situations constituting infringements and the examples are not intended to be exhaustive.

The Ambit of *Gongxuliangsu*

It can be seen from the above that the concepts of *gongxu* and *liangsu* in Chinese law bear some resemblance to the concept of public policy in other jurisdictions. For example, Article 90 of the Japanese Civil Code provides that '[a] juristic act with any purpose which is against public policy is void.' Similarly, Article 103 of the Korean Civil Act provides that '[a] juristic act which has for its object such matters as are contrary to good morals and other social order shall be null and void.' Elsewhere in English law, courts may refuse to enforce a contract on the basis of public policy.³⁵ The concepts are therefore not entirely novel. However, where the judiciary employs and accepts policy arguments in civil disputes, there is traditionally a caution to not interfere lightly with freedom of contract.³⁶ Extending the ambit of policy arguments arbitrarily may undermine the parties' freedom to voluntarily conduct themselves in civil relationships. In the Chinese context, it is paramount to reflect on the substance of the concepts and how the courts decline to enforce civil juristic acts in order to promote or safeguard some notions or policies which are perceived to be fundamental to the nation as against parties' expectation that legitimate civil juristic acts should be given their legal effects. Unlike the treatment in common law jurisdictions where 'public policy' is often considered an elusive concept whose application has to be tamed,³⁷ there is comparatively less emphasis on how to demarcate the limits of judicial discretion in this regard in Chinese law. But there is now more acknowledgement of the necessity of limiting judicial discretion in this regard. As explained, the recent Interpretation is an illustrative example set by the Supreme People's Court. This section discusses such limits for arriving at an objectively delineated standard of *gongxuliangsu*.

Applying *Gongxuliangsu* as a Legal Principle

It is imperative to ensure that *gongxuliangsu* operates as a legal principle to be applied mechanically, and not a phrase to be indiscriminately employed in judgments solely for the purpose of substantiating the court's reasoning in a generic manner. Guiding Case No. 140 is an example of a generic, rather than an undiscerning employment of *gongxuliangsu*.³⁸ The case involved a dispute regarding liability for an accident that occurred when the plaintiff fell from a tree while attempting to pick fruit within a public area in a Red Mountain Village. The Red Mountain Village Residents' Committee, responsible for managing the public area, was sued by the plaintiff's family members, who claimed that the committee had failed to ensure the plaintiff's safety and demanded compensation for his

³⁴See Notice by the Supreme People's Court on Issuing the Minutes of the National Court Work Conference for Civil and Commercial Trials 2019, s 2(1).

³⁵Percy H Winfield, 'Public Policy in the English Common Law' (1928) 42(1) Harvard Law Review 76.

³⁶See *Priming and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465: 'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore, you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.'

³⁷See generally John Shand, 'Unblinkering the Unruly Horse: Public Policy in the Law of Contract' (1972) 30 Cambridge Law Journal 144.

³⁸Supreme People's Court Guiding Case No 140: *Liqiuyue Deng Su Guangzhou Shi Huadu Qu Timian Zhen Hongshan Cun Cunmin Weiyuanhui Weifan Anquan Baozhang Yiwu Zeren Jiufen An* (2019) Yue 01 Minzai No. 273.

injuries and subsequent death. The claim was rejected. The court found that the committee's obligation to ensure safety in the public area was limited to reasonable and manageable measures within its capacity. Since the activity of picking fruit from trees within the public area was not officially sanctioned, and it was the plaintiff's own decision to engage in the activity while the trees themselves did not pose inherent safety risks. This means that a reasonable standard was met by the committee and causation was not made out. The court also found that the committee acted reasonably and without fault following the incident. The committee promptly called for emergency assistance, and local villagers also contributed to sending the plaintiff to the hospital for treatment. The court, however, included as part of its reasoning the finding that the plaintiff's action was in violation of the customs of the local village community, hence constituting a departure from public order and good morals. Such an inclusion is superfluous. It is submitted that the courts should refrain from invoking *gongxuliangsu* as a perfunctory means to buttress reasoning which is otherwise sufficiently soundly constructed. To treat *gongxuliangsu* as an extra layer of justification when the specific rules in that area of law are capable of delivering the same outcome suffers from a lack of precision in judicial reasoning.

The same is emphasised by the Supreme People's Court in Article 18 of the Interpretation:

Where the provisions of laws and administrative regulations despite using "shall," "must," "shall (may) not," or any other expression, are intended to restrict or confer civil rights, and an actor's violation of the provisions constitutes, for example, unauthorised disposition, unauthorised agency, or agency beyond the power, or causes the other party to the contract or a third party to acquire the right of revocatory action, the right to rescission, or any other civil right, the court shall determine the validity of the contract based on the civil legal consequences of violating the provisions specified by laws and administrative regulations.

Although this Article may appear difficult to grasp, it is essentially about provisions of laws and administrative regulations that restrict or confer civil rights. The concept is that if an act contravenes a law that restricts or confers civil rights and that contravention constitutes an unauthorised behaviour as a matter of civil law, the court shall determine the act's validity in accordance with that provision of law instead of *gongxuliangsu*. In other words, where other private law rules are applicable to invalidate an act, the court shall apply that rule before considering *gongxuliangsu*. To this extent, it may be said that *gongxuliangsu* should be applied residually when other private law rules are not applicable or fail to invalidate the act.

Not all Customs are Good Morals

Further, the courts must not conflate customs with good morals. Article 10 of the Civil Code provides that '[c]ivil disputes shall be resolved in accordance with law. Where the law does not specify, custom may be applied, provided that public order and good morals may not be offended'. It is clear from this Article that customs are not the same as public order and good morals. However, as can be seen from Guiding Case No. 140, courts may at times have considered that public order and good morals are synonymous with customs. This approach can be criticised because public order and good morals are normative concepts which find their roots in different sources, such as the general spirit of law and customary practices. It is precisely the judge's duty to distil the essential normative elements from these origins as the relevant normative concepts in law. Traditional customs such as the Confucian gender concept of 'exalting males and demeaning females' (*nanzun nubei*) and to 'assess a woman's behaviour and aspirations and her status relative to that of men'³⁹ ought to be discarded or closely scrutinised in modern Chinese society. While the Civil Code is unequivocally clear that 'a

³⁹ Alicia S M Leung, 'Feminism in transition: Chinese culture, ideology and the development of the women's movement in China' (2003) 20 Asia Pacific Journal of Management 359, 361.

marriage system based on freedom of marriage, monogamy, and equality between men and women is implemented',⁴⁰ instances of customary practices continue to exist and must be evaluated against the standards of modern decency and civility. Further, they are to be rejected in accordance with Article 10, if they offend public order and good morals. As judges have suggested with regard to undesirable marriage customs, the modern concept of *gongxuliangsu* mandates the eradication of demeaning superstitious marriage rites.⁴¹ As in other jurisdictions, where customs, that are not against public policy, may have the same effect as laws,⁴² the truth is that *gongxuliangsu* has the crucial task of being measured against and circumscribing customs in Chinese civil law.

The function of deterrence

There are some often-cited justifications for refusing relief on the basis of public policy or illegality: '(1) furthering the purpose of the rule infringed by the claimant's behaviour, (2) consistency, (3) prevention of profit from the claimant's wrongdoing, (4) deterrence, and (5) maintaining the integrity of the legal system'.⁴³ As to whether the principle has a punitive function,⁴⁴ the modern tendency is to acknowledge that while rules of civil law might have a punitive effect, this is not their predominant purpose. Punishment is a matter for the criminal courts.⁴⁵

It is well-established that the Chinese civil law system constitutes a set of legal rules which adjust personal and property relationships rather than apply criminal sanctions.⁴⁶ For consistency and for maintaining the integrity of the legal system, the law maintains its coherence by refusing to 'give by its right hand what it takes away by its left hand'.⁴⁷ The judicial system 'must aspire to be a unified institution, the parts of which – contract, tort, the criminal law – must be in essential harmony'.⁴⁸ For the prevention of profit from the claimant's wrongdoing, it essentially means that 'the court will not lend its aid to a man who founds his course of action upon an immoral or an illegal act or contract'.⁴⁹

As to the furtherance of the rule infringed by the claimant's behaviour, adopted in the context of *gongxuliangsu*, it should be understood as furthering some moral values and the protection of public order. In this regard, it is essential to recognise that the negative terminology of the law indicates that civil juristic acts are void if they contravene public order and good morals, as opposed to requiring them to be in compliance with or adherence to the latter. It follows that the primary purpose of *gongxuliangsu* should be regarded as deterrence instead of the promotion of loftier ethical standards. The deterrent function underlines that 'to hold otherwise would in some cases offer an inducement to crime or remove a restraint to crime and that its effect is to act as a deterrent to crime'.⁵⁰ How deterrence operates also requires consideration of the legal consequences that follow from a void civil juristic act, as provided in Article 157 of the Civil Code. While this issue falls outside the scope of the present discussion, it suffices to recognise that the function of deterrence in the Chinese context should be understood as predominantly negative in character, rather than as a judicial mechanism for affirmatively promoting values such as good morals.

⁴⁰See Article 1041 of the Civil Code: 'Marriage and family are protected by the State. A marriage system based on freedom of marriage, monogamy, and equality between men and women is implemented. The lawful rights and interests of women, minors, the elderly, and persons with disabilities are protected.'

⁴¹'Eradicating undesirable marriage customs' (革除婚俗陋习) *Legal Daily* (Beijing 5 Feb 2023) (in Chinese).

⁴²See for example, Souichirou Kozuka, 'The Law and Reality of Custom in a Civil Law Country: Experiences from Japan' (2022) 2 *Transnational Commercial Law Review* 34.

⁴³*Patel v Mirza* [2016] UKSC 42 para 22.

⁴⁴See for example, Richard A Buckley, 'Law's Boundaries and the Challenge of Illegality' in Richard A Buckley (ed), *Legal Structures: Boundary Issues Between Legal Categories* (Wiley & Sons 1996).

⁴⁵*Patel v Mirza* [2016] UKSC 42 para 120.

⁴⁶See David M Jones, *Basic Principles of Civil Law in China* (Routledge 1989) 14.

⁴⁷*Hall v Hebert* [1993] 2 SCR 159, 169.

⁴⁸*ibid* 165.

⁴⁹Lord Wright of Durley, *Legal Essays and Addresses* (Cambridge University Press 1939) 90.

⁵⁰*Beresford v Royal Insurance Company Limited* (1938) AC 586, 599.

Nevertheless, in the context of *gongxuliangsu*, how deterrence operates in the context of public order and good morals is more contested than the corresponding effect on crimes. If the deterrent effect is to have force, there must be a rule which is applied by the courts consistently and is widely known by members of the public, for they can only be advised on the enforceability of the civil juristic act if the rule is clear.⁵¹ Criminal law provides for this consistency. For morals, it can be suggested that, while they are inherently ambiguous and their standards varied among different individuals, they are, at the same time, held in everyone's mind intrinsically such that one knows the rights and duties without subjecting them to the opinion of another person whereas, for the law, one consults the statutes or has to refer to the opinion of the judge.⁵² The core issue is discerning the operative standards for the purpose of denying relief, thereby deterring parties from committing acts that violate public order or commit immoral acts.

Towards an objectively delineated standard of gongxuliangsu

This brings us to consider the appropriate substance of *gongxuliangsu* in courts as they enforce the legal principle whereby deterrence is its primary function. The concern is how to strike a balance between civil legal persons' expectation that certain legal actions should be legally recognised and acknowledging the occasions when the courts might intervene based on their discretion to provide some degree of legal certainty. First, there must be an objective element in such an exercise. A judge's own value system must not take precedence over the law's value system in *gongxuliangsu*. The room for judicial subjectivity must be limited. As once said:

it would be quite wrong ... for any judge to apply his own personal moral views, however strongly held, in deciding the legal rights of the parties. The court's function is to apply the law, not personal prejudice. Only in a case where there is still a generally accepted moral code can the court refuse to enforce rights in such a way as to offend that generally accepted code.⁵³

For public order, the objective element shall be developed from a systematic outline of the detriments to public order in the judgment which in theory should be less subjective than deciding on moral issues. As the basis of public order is that 'membership of social groups entails obligations of an overriding character which cannot be eliminated by mere agreement with a particular individual',⁵⁴ such as the maintenance of health and safety, determining a breach of public order should hinge on an objective assessment of the balance between individual interests and the essentials of common welfare.

For good morals, a possible objective limitation is to premise it on a widespread consensus over moral issues. A clear public consensus as to modern day's bounds of acceptable behaviour is the intuitive basis for deciding on good morals. The judge should have in mind 'what accords with customary morality and the general conscience of the community'.⁵⁵ The court must be capable of reflecting a representation of the contemporary *mores* of the average person, as distinguished from opinions premised on legal learning. But the judge must analyse further. The prescription of good morals suggests that merely following mass opinion or widely accepted moral conceptions is not sufficient. Where it concerns public policy, it has been suggested that it is incumbent on the judge to reject the mass morality when it is contrary to 'the opinion of the healthy elements of the population'.⁵⁶ The

⁵¹Juliet P Kostritsky, 'Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory' (1988) 74 Iowa Law Review 115.

⁵²See A L Goodhart, *English Law and the Moral Law* (Stevens & Sons 1953) 145.

⁵³*Stephens v Avery* [1988] Ch 449, 454.

⁵⁴Dennis Lloyd, *Public Policy: A comparative study in English and French law* (Athlone 1953) 9.

⁵⁵*ibid* 125.

⁵⁶*ibid*.

judge's discretion in this regard lies in the rejection of common morality where he or she believes that the conscience of the courts so requires.

In the context of Chinese law, good morals as a concept exemplify that the community in which the courts find their sources must possess wholesome social ethical standards for, by definition, to be considered within the ambit of *gongxuliangsu*, the norms must be virtuous. At the same time, finding a social consensus is a necessary limitation to counteract the possibility of finding these norms in an overly sagacious community. Values such as selflessness, integrity, and altruism are representative of standards inspiring individuals to reach for the best within themselves and contribute positively to their communities and society as a whole. They are nonetheless inappropriate to be promoted by the concept of *gongxuliangsu* as the paramount position of private law autonomy necessitates a refined standard involving moral concepts which possess a fundamental nature. That refined standard consists of minimum ethical requirements which serve as the basis for a harmonious society such as dignity. For example, where a disposition of the assets co-owned by a married couple is made by a person who commits an extramarital affair, the disposition is liable to be invalidated for it breaches good morals; a relationship which cannot be proved to be an affair but merely an unconventional relationship of financial support warrants different considerations and is not necessarily immoral.⁵⁷

A confined delineation of good morals is also preferable given the existence of the general principles of good faith and honesty in Chinese civil law,⁵⁸ and to 'act in a manner that facilitates conservation of resources and protection of the ecological environment'⁵⁹ which exhibit some degree of overlap with *gongxuliangsu*. Although it may be suggested that the other principles relate more to the performance of a contract rather than the content of a contract, to invoke and interpret breaches of public order and good morals loosely risks obfuscating these principles. If we compare the doctrine of good faith and the principle of *gongxuliangsu* – which both function to contribute to the establishment of an ethical, civilised commercial society in China – the idiosyncrasy and potential stretch of *gongxuliangsu* is plain. Whilst the former encompasses duties such as loyalty, non-deception, and business ethics, the latter, as explained above, relates to the minimal tolerable ethical standards, such as civil relationships predicated on deliberate harm to other people's interests through extortion or abuse of power. What is unique about *gongxuliangsu* is that it scrutinises the substance of a civil juristic act whereas the doctrine of good faith focuses on the formation and performance of typically the contract.

As discussed above, common to both general principles of Chinese civil law is however the caveat that, in rendering judgments, they shall be deployed whilst paying regard to other applicable laws, but not be casually relied upon by judges. It is the deterrence, but not the promotional function of *gongxuliangsu* that shall be borne in mind by judges when deciding cases for it is important to preserve parties' freedom to act and seek relief for their actions within the boundaries of civil law. As the principle of *gongxuliangsu* probes into the substance of the civil juristic act, it shall be founded with a degree of objectivity and public conscience to discourage fundamentally intolerable behaviours such that the judicial discretion accorded is not boundless.

Functional Fluidity of *Gongxuliangsu* in Chinese Civil Law

In addition to setting a boundary for judicial applications of *gongxuliangsu*, recognising the nuances and elasticity of *gongxuliangsu* is vital as a unique aspect of this concept in Chinese law. It is a concept

⁵⁷ Liuyanjudeng Yu Lizhilin Queren Hetongwuxiao Jiufen Ershen Minshicaipanshu (2023) Jing 02 Minzhong No. 1008.

⁵⁸ See Article 7 of the Civil Code: 'When conducting a civil activity, a person of the civil law shall, in compliance with the principle of good faith, uphold honesty and honour commitments.' See also Ewan McKendrick and Qiao Liu, 'Good Faith in Contract Performance in the Chinese and Common Law' in Larry DiMatteo and Lei Chen (eds), *Chinese Contract Law: Civil and Common Law Perspectives* (Cambridge University Press 2017) 72.

⁵⁹ See Article 9 of the Civil Code: 'When conducting a civil activity, a person of the civil law shall act in a manner that facilitates conservation of resources and protection of the ecological environment.' See also Zheng Jun, 'Integration of Public and Private Law in the New Era – The Green Principle of the Chinese Civil Code' (2022) 19 US-China Law Review 281.

that is intended to be fluid and has to be applied fluidly in Chinese civil law. Its standards must be subject to change for the principle's proper functioning. What is considered immoral by the courts in the past may appear unreasonable today for the moral values of society shift and change.⁶⁰ This aspect is especially relevant to Chinese society where the populace remains to be profoundly influenced by traditional culture. Since its inception, the concept's progressive malleability has made it significant in judicial efforts to do away with undesirable traditional customs in civil legal relationships. Currently, surrogacy is prohibited by Chinese courts. As it relates to social morality and the promotion of correct values,⁶¹ the courts have an overall tendency to reject rights arising out of surrogacy contracts.⁶² In the future, this stance may weaken and a different application of the concept may be required. What the law prohibits as contrary to good morals varies from time to time, since social habits and aspirations are constantly changing. The concept has to be fluid; if it were static, sociocultural developments would fail to be captured by the law, and the law would fall behind contemporary public discourse.

Further, in the Chinese context, the concept is also intended to be intrinsically fluid. The fluidity of the concept counterbalances what is commonly described in China as the rigidity of law which suggests that the law is typically reactive rather than pioneering, and it takes a prolonged time and effort for the law to respond to changing social and cultural conditions.⁶³ It is perceived that, with the nuances of public order, Chinese courts will be able to refuse enforcing contracts relating to matters that are yet to be placed at the forefront of the national legislative agenda.⁶⁴ Not only may the concept be applied where the law may struggle to keep pace with technological advancements may the concept be applied, but it may also apply in other instances of social, environmental, and ideological transformations.

It has been suggested in the context of English common law that the deployment of 'policy' is 'invariably cautious' and marked by the presence of 'an aversion to treating the category as an opportunity for constructive and imaginative approaches to novel situations, or to situations in which social changes have rendered existing legal doctrines anachronistic'.⁶⁵ Comparatively, the position in Chinese law is different. The deployment of public order and good morals is widely accepted as capable of addressing underdevelopments in the current law. As it is impossible for the legislature to foresee all issues that may arise in court – including the complexity of social relationships, limitations of legislative techniques, and the abstract nature of legal language – it is conventionally considered in the Chinese legal system that the law may at times inadequately cover new relationships which emerge from time to time.⁶⁶ If the judge were to mechanically apply the enacted laws without any discretion, the laborious task for the legislature would be to 'draft complete systematic legislation that would have those characteristics to such a degree that the function of the judge would be limited to selecting the applicable provision ... and giving its obvious significance in the context of the case'.⁶⁷ Since 'social necessities and social opinion are always more or less in advance of law',⁶⁸ the practical function of the judge, in the area of *gongxuliangsu*, where the court is expected to exercise its latitude, consists of being innovative in novel situations as a paramount aspect of the principle, in

⁶⁰ John L Dwyer, 'Immoral Contracts' (1977) 93 Law Quarterly Review 386.

⁶¹ Xiao Shanyun, 'Uterus rental: Regulating surrogacy in China' (2022) 90(1) Medico-Legal Journal 41.

⁶² See Ding (n 30).

⁶³ See Lei Chen, 'Continuity and change: some reflections on the Chinese Civil Code' (2021) 29(2) Asia Pacific Law Review 287, 289.

⁶⁴ Wang Chenguang, 'Law-making functions of the Chinese courts: Judicial activism in a country of rapid social changes' (2006) 4 Frontiers of Law in China 524, 546.

⁶⁵ Richard A Buckley, *Illegality and Public Policy* (Sweet & Maxwell 2020) 98.

⁶⁶ Chunyao Shen, 'Upholding the unity of advancing reform under the rule of law and perfecting the rule of law within the context of reform' (坚持在法治下推进改革和在改革中完善法治相统一) *Communist Party of China People's Daily* (Beijing, 19 Oct 2015) (in Chinese).

⁶⁷ John Henry Merryman, *The Civil Law Tradition* (Stanford University Press 1969) 30.

⁶⁸ Henry Sumner Maine, *Ancient Law* (John Murray 1908) 22.

contrast to the position in, for example, English law. In Chinese jurisprudence, *gongxuliangsu* and the concepts of public order and good morals tend to be perceived with more nuances as a practical legal principle. Some may have viewed the vagueness of concepts in Chinese law as an inherently problematic issue⁶⁹ without recognising the normative value that such elasticity offers to modern Chinese jurisprudence where the national legislative process is rather prolonged.

Such a flexible judicial practice reflects also the function of the judge in Chinese civil courts. Chinese judges when handling cases of wider social significance, are expected to ensure the public consequences are aligned with the ruling of the court itself by considering the combination of legal and social effects.⁷⁰ The sentiment in society bears relevance. If a decision is difficult for the public to accept, it is incumbent on the court to deliberate upon the wider societal ramifications.⁷¹ This deliberation assumes particular significance when it comes to cases involving the concept of public order. While statutes may sometimes fall behind the evolving landscape, the flexibility for judges in this regard is central to how they exercise their judicial powers with wisdom in balancing the application of the law and public consequences where economic, social, and cultural conditions are constantly and rapidly changing in modern China. While it is likely an obsolete suggestion that 'Chinese legislators have trouble keeping pace with rapid social and economic changes taking place in modern China',⁷² the concept's significance and usefulness remain undeniably present.

The National Context

Finally, it is meaningful to consider *gongxuliangsu* in the broader national context. *Gongxuliangsu* as a concept is entrenched in the Chinese Civil Code backed by national ideologies. One of the ideological discourses pertinent to *gongxuliangsu* in the Civil Code is the elevation of the importance of governing the country by moral virtues in Xi's era. When discussing the draft of the Civil Code, it was said in the national legislature that the Civil Code must manifest the principle of:

adhering to the combination of governing the country by law and governing the country by virtue, emphasising the integration of socialist core values into civil legal norms, vigorously promoting traditional virtues and social ethics, strengthening a sense of rules, advocating the spirit of contracts, and upholding public order and good customs.⁷³

In China's national plan to construct a rule of law-based society, strengthening the construction of moral norms is highlighted. One of the key points is to 'adhere to the combination of governing the country by law and governing the country with virtue, integrate legal norms with moral norms, and nurturing the spirit of the rule of law with ethics'.⁷⁴

The authoritative view in the Chinese legal community is that governance of the country must be predicated on the promotion of law and good morals at the same time. As Xi said in one of his addresses to the Politburo of the Chinese Communist Party, 'the law embodies the codified principles of morality, whereas morality serves as the intrinsic code of conduct. Both law and morality play pivotal roles in regulating societal conduct, moderating social relationships, and upholding social

⁶⁹See John H Matheson, 'Convergence, Culture and Contract Law in China' (2006) 15 Minnesota Journal of International Law 329.

⁷⁰Xin He, 'Pressure on Chinese Judges Under Xi' (2021) 85 China Journal 49, 67.

⁷¹Shen Deyong, 'Chinese Judicial Culture: From Tradition to Modernity' (2011) 25 Brigham Young University Journal of Public Law 131, 134.

⁷²Chunlin Leonhard, 'A Legal Chameleon: An Examination of the Doctrine of Good Faith in Chinese and American Contract Law' (2010) 25 Connecticut Journal of International Law 305.

⁷³Xinhua News Agency, 'Lianghui shouquan fabu guanyu zhonghua renmin gonghe guo minfadian caoan de shuoming' ((两会受权发布)关于《中华人民共和国民法典(草案)》的说明) [Explanation on the Draft Civil Code of the People's Republic of China], (Xinhua She [Xinhua News Agency], 22 May 2020).

⁷⁴Chinese Communist Party, 'Implementation Outline for Constructing a Rule of Law-Based Society (2020-2025)' (Chinese Communist Party, Dec 2020) para 10.

order.⁷⁵ As part of the national agenda, there is a strong conviction that the twin pillars of rule by law and moral governance are inseparable, and must be harmoniously upheld in the realm of statecraft. Hence, within the Chinese context, there exists little disagreement regarding the alignment of moral principles with civil or criminal law. The current approach led by Xi is to ‘elevate widely accepted, relatively mature, and operationally feasible moral requirements to legal norms in practice, guiding the entire society to uphold morality and goodness.’⁷⁶ The inclusion of *gongxuliangsu* in the Civil Code is representative of this notion.

There is also increasing emphasis in the national jurisprudential conceptual framework that justice as delivered in courts should be ‘felt’ by the public. Efforts have been made to ensure that the people feel fairness and justice in every court decision. The principle of *gongxuliangsu* is an illustration that ‘Chinese judges consider not only legal effects of judgments, but also their social effects’, which has been described as a ‘results-oriented type of legal reasoning’ in civil law.⁷⁷ The Chinese judges’ mandate, in connection with *gongxuliangsu* is, in fact, to consider even-handedly social justice and personal justice (justice *in rem* and justice *in personam*).⁷⁸ This suggests that the judge is not merely concerned with ‘justice between parties to a dispute’, but also that the law justly ‘conforms to some social principle’.⁷⁹ The interplay of the discourses in the court’s own introspection and public sentiment is to be evaluated by the judge as part of the pursuit of a harmonious alignment between legal and social implications in judgments.⁸⁰ It is apparent that not all civil cases warrant taking into account social consequences. But given the overt community element of cases where *gongxuliangsu* has been raised, the pledge fundamental to Xi’s ideology of rule of law of ‘striving to ensure that the public feels fairness and justice in every judicial case’ is to be taken into account in those judgments.⁸¹ The promise is to make fairness and justice more ‘tangible’ and enhance the public’s confidence in the courts in delivering fairness and justice.⁸² The notion is that if the populace can genuinely sense that fairness and justice are dispensed, there may be a more conscious adherence to the law and a performance of good causes, with heartfelt support for the legal system.⁸³ *Gongxuliangsu* is one of the instances where Chinese courts have to consider and deliver social justice which is increasingly emphasised at national level.

Conclusion

This article has presented a comprehensive analysis and critique of the principle of *gongxuliangsu* in the Chinese Civil Code. *Gongxu* refers to interests of national security and interests fundamental to social public order. *Liangsu* refers to virtuous customs representing social morality, family ethics, and personal dignity. The core idea behind the principle is that civil law cannot be immune to violations of public order and good morals. At the same time, some level of judicial restraint should be in place to ensure that the abstractness of the principle serves to ultimately deliver fairness in an ever-changing society but not to lead to inconsistency or imprecision. This article has provided a

⁷⁵ Xi Jinping presided over the 37th collective study session of the Political Bureau of the CPC Central Committee (习近平主持中共中央政治局第三十七次集体学习), *Xinhua News Agency* (Beijing, 10 Dec 2016) (in Chinese).

⁷⁶ *ibid.*

⁷⁷ Shiyuan Han, ‘General Principles under the CCL’ in Larry DiMatteo and Lei Chen (eds), *Chinese Contract Law: Civil and Common Law Perspectives* (Cambridge University Press 2017) 29, 42–43.

⁷⁸ Lord Devlin, ‘Judges and Lawmakers’ (1976) 39 *Modern Law Review* 1, 7.

⁷⁹ *ibid.*

⁸⁰ See Jinhua Cheng, *Zhongguo shi sifa hezouqu* (中国式司法“合奏曲”) [*Chinese-style justice ensemble: A Case Study in Perspective of Sociology of Law*] (People’s Courts Publishing 2019).

⁸¹ Yizhan Liu, ‘Striving to ensure that the public feels fairness and justice in every judicial case – The story of Xi Jinping’s efforts to promote judicial fairness’ “努力让人民群众在每一个司法案件中感受到公平正义”——习近平推进司法公正的故事 *Xinhua News* (Beijing, 6 Jul 2021) (in Chinese).

⁸² *ibid.*

⁸³ Fanzhe Meng, ‘Making the Judiciary to have strength and compassion’ (让司法有力量有温度) *People’s Daily* (Beijing, 31 Aug 2023) (in Chinese).

normative analysis of its ambit and applicable circumstances for the principle to operate with consistency whilst keeping pace with the necessities of social justice in the modern era. It is argued that the concept must be applied as a legal principle; it shall be distinguished from the concept of ‘customs’; deterrence rather than punishment should be its primary function; and an objectively delineated standard of the concept should be refined with a degree of objectivity and public conscience to discourage fundamentally intolerable behaviours. This article also shows that, distinctively, the concept of *gongxuliangsu*, when compared with similar concepts of public policy in common law jurisdictions, has a widely-accepted, nuanced function of addressing novel situations by offering judges flexibility. Limiting judicial discretion is not the main theme in Chinese law in this regard.

In the final analysis, this principle of law underpins the importance of public order and good morals in China’s nation-building. Public order is evident in its role, for it entails elements fundamental to the collective well-being and essential for fostering the progressive development of modern civilised society. The same applies to moral values as magnified within contemporary Chinese discourse. As the famous Chinese proverb goes, ‘A nation cannot prosper without virtue (*Guowudebuxing*), and an individual cannot stand without virtue (*Renwudebuli*)’. In embracing *gongxuliangsu*, the ultimate aspiration is that individuals can contemplate and address ethical questions within themselves. For, as Xi suggests,⁸⁴ while laws can regulate behaviour and enforce penalties, they cannot replace the internal process of addressing moral and ethical issues within oneself through which legal and virtuous norms become more firmly ingrained in one’s mind and daily life.

⁸⁴See *Shiba da yilai zhongyao wenxian xuanbian* (十八大以来重要文献选编) [Selected Important Documents Since the 18th National Congress] (Chinese Central Literature Publishing House 2014) 722.